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Supreme Court of the United States

October Term, 1962

No. 446

JOSEPH CASTELLI, a k a GIUSEPPE GAGLIANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

(ON PETITION FOR A WRIT OF CERTIORARI)

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The Government's Memorandum in Opposition contains statements which are confusing if not misleading. While petitioner may not complain of the casual treatment of some issues and ignoring of others he may properly complain of presentations which are not justified by the record.

1. The government states that the Court docket was "neutral," being blank not only in the space for defendant's attorney, but for the government's attorney as well (G.M. 3, 6);[1] it also says (G.M. 7) that the fact that petitioner was arrested, had bail refused and was ultimately released in one day, suggests he had the assistance of counsel. These statements disregard the docket page which is contained on page 12a in the Government's Appendix in the Court of Appeals: as clear as can possibly be, is the name of the Assistant U. S. Attorney in charge of this case, Isaac Gutman. And no name is listed in the space provided for the name of counsel for the defendant. Further on the same page, it appears that all these things did not happen in one

[1] "G.M." refers to Government's Memorandum in Opposition.

day, but that in truth the defendant was arrested on the 3rd day of January, and released on the 4th. Further, the Government's Memorandum to this Court utterly ignores Government's Exhibit G (which is also Petitioner's Exhibit 1) contained on page 66 of the Petitioner's Appendix in the Court of Appeals, listing the names and addresses of attorneys for defendants in 68 cases, but not for this defendant's case. (Reference to this was made in the Petition to this Court, p. 11.)

2. The government's Memorandum misleads this Court by implying that the petitioner's testimony, that he could sign his name if he "took it easy", was first given following his being shown signatures on fingerprint charts (G.M. 4). In truth, *before he was shown anything*, he was asked (Tr. 159)[2]:

> "Q. If you had to sign something would you use an X?. A. I don't remember.
> Q. I can't hear you. A. *Sometime if I can make it I sign.* If I can't make it, I put an X. I don't remember very well." (italics added)

This question was put to petitioner in 1961, on a surprise re-call by the government (Tr. 158); there had been no previous discussion of signature. Notwithstanding, and with no fingerprint chart exhibited or offered, he did testify, about his 1927 ability, that "if I can make it, I sign" which later testimony translated to mean that he could sign if he "take time" (Tr. 161, 162) or "take it easy" (Tr. 163, 164). Further, the chart first shown him, containing the signature "JOSEPH CASTELLI" (Govt. Ex. C) was clearly not the signature of petitioner, as was called to the District

[2] "Tr." refers to transcript of the hearing in the district court; page references follow the procedure of the government's memorandum, to wit, the numbers at the bottom of each page, which are actually renumbered to make them record pages. The original numbers at the top of the transcript pages are ignored.

Court's attention (Tr. 167) and as that Court apparently recognized by its referring to only *two* cards although *three* were put in evidence by the government (Pet. 5, 18).[3]

3. The opinion of Judge Murphy, referring to the Exhibit set out on page 12a of the Government's Appendix in the Court of Appeals, says:

> "This docket is revealing * * *. These entries indicate that the petitioner had friends or family, or perhaps his own resources, on the day of his arrest, and are some evidence negativing his picture of an illiterate foreigner confused by the mysterious workings of the judicial process. Of course, it is not conclusive but we feel that it has some probative value." (Pet. 19)

The Court had completely forgotten that the petitioner himself had *testified* that he had a father in the United States at the time of his arrest (Tr. 52, 53) and that his father had arranged bail for him (Tr. 56, 185, 186). Further, and more important, the petitioner never claimed, as the District Court thought he did, that he was "confused by the mysterious workings of the judicial process." On the contrary, when the Judge expressed a similar misunderstanding at the hearing, the following ensued (Tr. 90):

> "Mr. Fried: * * * The defendant never said he didn't know what he was doing, your Honor. He has merely mentioned—he has merely said that he was not represented by counsel in 1927.
>
> The Court: He has said much more than that."

Then the Court said to the witness (Tr. 91):

> "The Court: I mean, are we agreed that in 1927 you knew what you were doing when you pleaded guilty?
>
> The Witness: I understand I pleaded guilt; somebody told me all the time guilty means I go to jail.

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[3] "Pet." refers to the Petition for Certiorari.

> The Court: And you knew by pleading guilty you could be sent to jail?
>
> The Witness: Yes."

The District Court's error in this respect was apparently so clear that the government's Memorandum, in arguing to support the finding of untruthfulness, does not attempt to justify this error.

4. The government's Memorandum utterly ignores the significance of the flat discrepancy between the affidavit made by Leonard Maran, Esq. in 1953 based upon a conversation with Mr. Johnson, and the present denial by Mr. Johnson that he had ever said such a thing to Mr. Maran (G.M. 5). Mr. Maran's affidavit said (Tr. 140):

> "It is deponent's understanding from the present clerk of the criminal part of this court that it was not customary in 1953 for the court to affirmatively interrogate the defendant upon his arraignment with respect to whether he wished counsel appointed or not, except in very serious cases."

Mr. Johnson denied telling this to Mr. Maran (Tr. 119). Mr. Johnson was the "present clerk of the Criminal Part" in 1953. Was Mr. Maran's affidavit in 1953 true or false? Or was Mr. Johnson's present denial true or false? Obviously, they could not both be true; obviously, believing one rather than the other would have a deep effect on the decision; yet the Distlict Court slurred over this discrepancy; and the government's Memorandum makes no attempt to discuss it, much less justify it. Clearly the District Court was influenced by Mr. Johnson's testimony; yet this testimony was required to be discounted if Mr. Maran were truthful. The District Court, certainly made no finding that Mr. Maran was in error; it just apparently put that evidence aside, but without saying so and certainly without any reason for doing so.

5. The government's Memorandum to this Court ignores its own red flag: it quotes Mr. Johnson's testimony that

Judges "did not customarily go into the matter as thoroughly as they do at present" (referring to offer of counsel) (Tr. 150-152). Yet the question as to how deeply the Court went into the question of counsel in accepting a plea from a defendant without an attorney, was the basis of the reversal by this Court on this very issue in *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948). See also *U. S.* v. *Lester*, 247 F. 2d 496 (C. A. 2, 1957). The government's Memorandum ignores these cases, as if it is quite immaterial whether an offer of counsel, if made, was made perfunctorily or was made in the manner required for valid acceptance of waiver of counsel.

6. The government (G.M. 4) refers to police records "bearing petitioner's signature on the back of which were answers obtained by police interrogation." The government's Memorandum refers to the card signed "JOSEPH CASTELLI", as if this is one such card, yet as discussed in "2" above, this card was not signed by petitioner and was apparently ignored by the District Court itself. The information on the back of the fingerprint charts had to do only with *place of birth and occupation* (Pet. 16) and how this could prove that the petitioner "lied" with reference to his ability to write and his ability to understand English, is quite incomprehensible (Pet. 11). Further, contrary to the Judge's recollection, the petitioner did not claim that he couldn't "understand" English in 1927: indeed, he had said he spoke a "little bit" (Tr. 50) and understood a little (Tr. 40). If the cards show that he could tell the police he was born in Italy and was a longshoreman, how does this show he lied when he said he understood and spoke a "little bit" of English. And how does his ability merely to sign his name prove he *lied* about his ability to write English?

7. The government, as did the District Court, treats of Mr. Johnson's testimony without conceding its inherent weakness. Apart from part of his testimony being contradictory to what he said in a case in 1953 (see Point 4 of this

Reply Brief), Mr. Johnson was only a relief man in Criminal Part in 1927. He was in Criminal Part *only about 10% of his time* on duty, being actually regularly attached to other parts (Tr. 148, 95-97). His testimony that it was a regular practice in 1927 to interrogate defendants with respect to whether they wished counsel assigned, in the face of this record, is a pretty thin reed to support the District Court's opinion.

8. The government suggests to this Court that petitioner's affidavit as to his detention on the motion *coram nobis* conflicts with the docket entries of his prompt release on bail (G.M. 3). Fairness should have dictated pointing out that there might have been confusion but no contradiction, for petitioner was taken into custody by New York State authorities soon after his release on bail for violation of parole and detained continuously until his plea of guilty on June 29, 1927 (Tr. 57, 58).

9. The government quotes court clerk Johnson's testimony that he could remember no instance of a plea being accepted when the defendant appeared not to understand the charge (G.M. 5); and then adds, in its "Argument" (G.M. 6):

> "In support of his very belated claim that he did not knowingly enter a plea of guilty, petitioner offered his own testimony."

Now, while there is some excuse for the District Court to have made this mistake (Point 3 above) since the transcript was not before him, there is none for the Solicitor General's office which had the testimony on this score (Tr. 90-91). He knew he was in court in 1927 on a narcotics charge (Tr. 31); he knew he was pleading guilty and that he could go to jail by doing so (Tr. 35); it was made crystal clear that he was *not* contending that he did not know what he was doing, but only that he then had no lawyer and was not offered one (Tr. 90-91).

Further, Mr. Johnson's testimony as referred to, is quite meaningless. Being then in that court only about 10% of his time, he can hardly be witness to an invariable procedure. Nothing said by petitioner as to what happened on the plea of guilty, even as elicited by the Command Performance in the District Court (Tr. 76-78) would have the effect of alarming a court clerk into concern whether that defendant comprehended what was going on.

Further, from Mr. Johnson's testimony as to 1927, there was certainly an awful lot of confusion in the courtroom (Tr. 144-146), with pleas of guilty being taken at least in Prohibition cases from persons who neither had nor were offered counsel (Tr. 145); nay, more, with pleas of guilty taken from *persons who were not even the right defendants* (Tr. 145). That some judges of the Southern District set low fines for those who would plead guilty (Tr. 145-146) did not make the offense trivial, for violations were punishable by imprisonment.

10. The government fails to discuss the argument in the Petition (Pet. 8-9) that the District Court erred in placing a "heavy" burden on petitioner to rebut the presumption of regularity of the 1927 conviction. The Petition pointed out that not until the 1938 decision of this Court in *Johnson* v. *Zerbst* did the bench and bar realize that an unrepresented defendant was *required* to be assigned or at least offered counsel even in a non-capital case; and that therefore it was unrealistic to carry the presumption of regularity of a 1927 judgment to the extreme of placing a "heavy" burden on petitioner to refute it.

The government's chief witness, Mr. Johnson, has admitted that in 90% of the cases in the Southern District in 1927, the Prohibition cases, there was no offer of counsel to defendant who had no attorneys, and yet pleas of guilty were taken from them (Tr. 145-146). Does the government claim that Prohibition-type cases are *not* within the scope of *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)? Of course not!

The Sixth Amendment applies to "*all* criminal prosecutions."

How does the government explain the basis for presuming that the bench of the Southern District were eleven years ahead of the 1938 rule as to 10% of the criminal prosecutions, and yet ignored the rule in 90% of the cases? The only answer can be that in 1927 there was *no* standard practice in the Southern District of assigning or offering counsel in non-capital cases, and a "strong" presumption that there was, flies in the face of the known facts.

11. The government rejects as without merit the Petition's discussion (Pet. 6-7) as to Rule 52(a) of the Federal Rules of Civil Procedure (G.M. 8). Is the government able to figure out from the opinion below whether the District Court thought petitioner did actually have an attorney? Or whether the Court thought he didn't have one but had waived counsel? On what facts was the existence of counsel found—if it was? On what facts was—or could be—waiver of counsel found?

We deal here with basic fairness quite apart from Rule (cf. *The E. A. Packer*, 1891, 140 U. S. 360). Even under the Cri nal Rules (F. R. Cr. P. 23(c)) the facts are required to be found specially if requested. The reasons are set out in many decisions, perhaps most expansively in *U. S.* v. *Forness*, 125 F. 2d 928, 942 (C. A. 2, 1942).

The government asserts that the civil rules do not apply (G.M. 8). The Court of Appeals for the Fifth Circuit thinks otherwise (*Rushing* v. *Wilkinson*, 1959, 272 F. 2d 633, 638, note 3).

12. The government's Memorandum ignores the question whether the proper administration of justice in the lower courts calls for some check to a long time interval (here, over four months) between the close of testimony and the making of a decision based on recollection of such testimony without a transcript on hand (Pet. 7, 2, 3). If

this were a case which the government could appeal had it lost below because of vagueness of the Court's recollection, can it be doubted that the government would be claiming error in this regard? In four months between testimony and decision, is it not inevitable that some of the testimony becomes altered in recollection; and in a close case of conflicting evidence, is not every such possibility a potential source of injustice Does not such possibility enhance the desirability of adequate specific findings of fact (Point 11, above) as well as call for reversal where the slightest doubt exists whether prejudice has resulted? And does not this practice call for the supervisory power of this Court to be used to discourage such a practice?

Respectfully submitted,

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